

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F602832

GLADYS HERNANDEZ, EMPLOYEE	CLAIMANT
WAL-MART STORES, INC., EMPLOYER	RESPONDENT
CLAIMS MANAGEMENT, INC., INSURANCE CARRIER	RESPONDENT

OPINION FILED NOVEMBER JUNE 24, 2008

Upon review before the FULL COMMISSION in Little Rock,  
Pulaski County, Arkansas.

Claimant represented by the HONORABLE D. BRENT STERLING,  
Attorney at Law, Fayetteville, Arkansas.

Respondents represented by the HONORABLE DALE W. BROWN,  
Attorney at Law, Fayetteville, Arkansas.

Decision of Administrative Law Judge: Affirmed as modified.

OPINION AND ORDER

The respondents appeal an administrative law judge's opinion filed April 30, 2007. The administrative law judge found that the claimant proved she sustained a compensable injury, and that the claimant proved she was entitled to temporary total disability benefits and medical treatment from Dr. Raben. After reviewing the entire record *de novo*, the Full Commission affirms the administrative law judge's opinion as modified. The Full Commission finds that the claimant proved she sustained a compensable injury to her

low back, but that the compensable injury resolved no later than November 1, 2005. We find that the claimant did not prove Dr. Raben's treatment was reasonably necessary, and that the claimant did not prove she was entitled to temporary total disability benefits beginning February 23, 2006.

I. HISTORY

The record indicates that Gladis Hernandez, age 36, began working for Wal-Mart Return Center in September 2000. Ms. Hernandez testified that she was a "freight processor, processor of merchandise." The claimant described her work as involving scanning, taking items from boxes, and re-packing. The claimant's work also required lifting. The parties stipulated that the employment relationship existed on August 11, 2005. The claimant testified on direct examination:

Q. Now, August 11<sup>th</sup>, 2005, was a Thursday. What were you doing on that day?

A. I got there like I did every day to work. I began to - we were doing books steadily. I, you know, was doing the same work. I was Line Number 5, up above. There's a man that gives the merchandise, and the line is like this - it runs like this (indicating). And I opened the box of books. I started scanning, and then I wasn't using that gun, not anymore. I started standing up and moving. I got the merchandise. We had to

lift the merchandise one by one to scan it like this (demonstrating)....

Q. So about knee level? Right below your -

A. A little bit below the knee. Every box, every box, every merchandise that we checked. Yeah, we would sometimes grab the box. And then when the cart was full, we would have to go take it to put it on the line. To put it on the line for put-away. Other people would have to put it on put-away, but I would have to bend over. I always - I had to lift the heavy stuff. And I had to use my right leg sometimes because they were very heavy. I couldn't lift them....

Q. And what happened to you?

A. I started feeling pain in my lower back. It was - and I told - it was about 10:00 in the morning. The supervisor wouldn't be around there, and when he did come around, I told him my back was hurting.

Q. Who was that?

A. Jim Land, my supervisor.

Q. And what did you tell him?

A. That my back was hurting. No, no, I just told him my back hurt and he didn't even say to go do a report or anything. And then afterwards my manager showed up and I told him, because it kept hurting

Q. Who was your manager?

A. Ken Pack.

Kenneth Pack testified that he was the claimant's manager on August 11, 2005. Mr. Pack testified, "I remember the incident....I think it was the next day that she came in

and told me she had hurt her back the day before....She came to me one morning and told me, and I'm not sure which day it was, but she came to me and she said that the day before she had hurt her back....That the line was jammed and she was trying to pull a box off the line and she twisted her back."

The claimant signed a Form AR-N, Employee's Notice Of Injury, on August 12, 2005. On the Accident Information section of the Form AR-N, the claimant indicated a Date of Accident of August 11, 2005 and that the Time of Accident was unknown. The claimant wrote "lower back has pain." The cause of injury was "scanning (sic) books because are heavy boxes."

Dr. Konstantin V. Berestnev saw the claimant on August 15, 2005 and reported, "Ms. Hernandez presents today for the injury from 08-11-05. The patient stated that she was lifting heavy boxes and felt pain in her lower back. She complains of lower back pain that radiates around to the left side....The x-ray of her lumbar spine reveals no fractures or dislocations."

Dr. Berestnev assessed "Lumbar strain" and advised the claimant to "avoid lifting more than 40 pounds and avoid twisting at the back." Mr. Pack testified that the respondent-employer provided light duty for the claimant.

The claimant treated with a physical therapist beginning August 24, 2005.

An MRI of the claimant's lumbar spine was taken on September 1, 2005: "There is a disc herniation at L5-S1 on the right extending into the foramen and impinging on neural elements. The remaining disc spaces are entirely normal." The impression was "herniated nucleus pulposus at L5-S1 on the right."

Dr. Gary L. Moffitt saw the claimant on September 1, 2005: "She complained of tenderness to palpation along the inferior portion of the left SI. There was a little bit of muscle tightness and spasming around this area....An MRI was then obtained of her lower back. She was found to have a herniated nucleus pulposus at L5-S1 but it was on the right, not on the left. It is my impression that she has a lumbar strain that is involving the left SI area. She does have a herniated disc, but it is on the right side and does not correlate with her symptoms....She is to remain off work."

Dr. Moffitt noted on September 6, 2005, "Ms. Hernandez is seen today for recheck for lumbar strain. She says she is feeling better....There is no swelling or discoloration of her lower back. There is no tenderness to palpation today or any muscle tightness or spasming....Currently she

is improved. There is no objective evidence of any major problems at this time." Dr. Moffitt advised the claimant that she could return to restricted work and he planned to resume the claimant in physical therapy. A physical therapist reported on September 14, 2005, "Mrs. Hernandez has completed an additional course of rehab. She has full active lumbar motion....She no longer complains of S.I. pain....I feel she should seek a lighter rated job to ensure her work longevity but should be able to return to regular duty now."

An orthopedic surgeon, Dr. Robert J. Tomlinson, Jr., saw the claimant on September 21, 2005:

Gladis Hernandez is a 34-year-old female who while working for Wal-Mart as a processor lifted a 35 lb box from about knee high and felt acute pain in her low back. Since that time, she has had intermittent numbness in her leg, she says to the top of the her right foot. She has had a MRI scan on 9/01/05, which was officially read as a herniated nucleus pulposus L5/S1....

Evaluation of her x-rays show some mild disc space narrowing L5/S1. MRI scan, I have also reviewed, shows protruded L5/S1 disc.

Impression: Protruded L5/S1 disc.

Plan: I think Gladis has a high chance of full recovery with therapy alone and therefore we will continue her therapy three times a week for three weeks.

Work Status: She may return to work, no lifting or carrying greater than 10 lb.

The claimant followed up with Dr. Moffitt on September 30, 2005: "She is tender in the left SI region. There is a little bit of muscle tightness and spasming present. It is not as bad as it has been in the past....She has seen Dr. Tomlinson who feels that she has a disc protrusion which was demonstrated on MRI, but it is to the right and did not correlate with her symptoms. He felt that conservative management was most appropriate and I am in agreement with this. Ms. Hernandez and I had a significantly long discussion about her condition. I think her condition is mostly muscular, but there is a lot of anxiety superimposed on this as well as fear. I explained to her how this degree of anxiety and fear can delay recovery, and that I do not feel that there is any major pathology present in her back. I do not feel that she is in need of any type of surgical procedure....At this time I think she may continue to work. She should not lift, push or pull with more than ten pounds of force."

Dr. Moffitt saw the claimant on November 1, 2005:

She is doing much better....She says she only has a minor amount of pain in her lower back on the left side from time to time, but she is able to do essentially whatever she wants. She is having

some numbness of the dorsal aspect of the great toe of the right foot and this would be in keeping with an L4 radiculopathy which correlates with her MRI findings.

Ms. Hernandez and I had a discussion today about hysterical conversion reaction and their sequelae. She seemed to have a better understanding today. From what she tells me, her personal physician has taken her off work for her emotional disorders until the latter part of December....

She is very cheerful, pleasant in no distress. There is no significant tenderness to palpation of the left SI region. No muscle spasm is found to be present on palpation. Reflexes are normal in the knee and ankle region bilaterally. She has a normal gait.

Today there are no objective medical findings of any problems with her back. I feel that she may be released to work at full duties based on the problem she has had with her back. She needs no further treatment. There is no permanent impairment. I will defer to her personal physician for treatment of her emotional situation.

Dr. Moffitt reported on January 13, 2006, "Ms. Hernandez is seen today with a complaint of pain in her lower back going down her right leg into her right foot and numbness along this area as well....There is no muscle tightness or spasming in her lower back on palpation....Her symptoms today are in keeping with an L5-S1 radiculopathy on the right....She may continue to work without restrictions."

Dr. Hugh G. Donnell, the claimant's personal physician, referred the claimant to Dr. Kelly R. Danks, a neurological

surgeon. Dr. Danks examined the claimant on February 7, 2006 and assessed "Back pain and degenerative disc bulging at L5-S1....At this time, she is having mainly back pain. I have recommended that she see Dr. Cannon for epidural steroid injections, and continue her antiinflammatory. I will see her back when Dr. Cannon is completed with her."

On February 8, 2006, Dr. Donnell placed the claimant on a leave of absence from work.

The claimant testified that she stopped working in February. The claimant agreed that she applied for and received short-term disability.

The claimant began treating with Dr. Cyril A. Raben, an orthopaedic surgeon, on February 14, 2006. Dr. Raben assessed "Lumbar radiculopathy at L4, L5 or S1." Dr. Raben's recommendations included additional diagnostic testing.

An MRI of the claimant's lumbar spine was taken on February 17, 2006, with the impression, "The L5-S1 interspace shows a small disc herniation to the right which compromises the caudally coursing right S1 nerve root. Degenerative disc disease and disc space narrowing is noted. The remainder of the scan is normal. IMPRESSION: Small

right-sided disc herniation at L5-S1 compromising the right S1 nerve root."

An EMG report on February 21, 2006 showed the following impression: "Normal electrodiagnostic study of the right lower extremity and corresponding paraspinal musculature. There is no electrodiagnostic evidence to suggest radiculopathy, plexopathy, generalized peripheral neuropathy, or peripheral nerve entrapment syndrome or injury."

Dr. Raben noted on February 23, 2006, "Review of her MRI scan shows that she has persistent desiccation of the L5/S1 interval with no real desiccation to speak of at L4/5. There is no evidence of any annular tear or any abnormality at L4/5 that I can ascertain. She has a herniation at L5/S1 that appears to be more right sided....I would suggest disc space injection with discography at L5/S1 as well as an epidural steroid injection."

Dr. Raben performed a disc space injection on March 13, 2006 and a neuroforaminal block at L5/S1 on March 27, 2006.

On April 13, 2006, Dr. Raben performed a procedure which included a hemilaminotomy and discectomy at L5/S1 on the right. The pre- and post-operative diagnosis was

"Herniated nucleus pulposus L5-S1 on the right with subsequent L5 and/or S1 radiculopathy."

Dr. Raben informed the claimant's attorney on April 25, 2006, "I believe the acute and proximate cause of her symptomology is related to an on-the-job injury creating a lumbar disc herniation. This subsequently, of course, resulted in her need for surgical intervention....She is currently off work and will remain so through the healing phase of her postop condition."

Dr. Raben noted on May 15, 2006, "She had an arthroscopic discectomy 4/13/06 and got 1 week of total relief from her pain. Now the pain is back with a vengeance (sic). She states the pain is just like before surgery and actually a little worse." Dr. Raben excused the claimant from work "for the next month." On June 5, 2006, Dr. Raben took the claimant off work until August 7, 2006.

Dr. Raben wrote to Cigna on July 26, 2006:

Gladis Hernandez is a patient under my care who suffers from degenerative disc disease herniated nucleus pulposus and spinal stenosis at L4-S1. Conservative care, previous injections and surgical intervention have failed to provide lasting relief and improve her function. To address this condition Mrs. Hernandez is scheduled to undergo decompression and spinal fusion surgery staged anterior on 8/2/06 and posterior on 8/3/06. The fusion will be a multilevel fusion from L4-S1....

On or about August 2, 2006, Dr. Raben performed operative procedures to include posterolateral fusion at L4 and revision of hemilaminotomy at L4-5 on the right. The pre- and post-operative diagnoses were as follows: "1. Previously operated lumbar spine with perineural scarring adhesion to L5-S1 on the right. 2. Disc drainage of L4-5, L5-S1. 3. Status post anterior lumbar interbody fusion, L4-5, L5-S1, with instrumentation."

Dr. Raben discharged the claimant from the hospital on August 6, 2006, with the diagnoses of "Disk derangement of L4-5 and L5-S1" and "Depression."

It was noted on September 6, 2006, "Gladys presents back today two weeks after her surgery and is doing very well. She feels that her pain is much better than before surgery though she is having some problems with some swelling in her right ankle. Other than that, she has really no complaint. Gladys has questions as far as where she goes from here and I feel she will be off work for at least the next year if she is ever made able to get back at all to any type of labor."

A pre-hearing order was filed on January 11, 2007. The claimant contended, among other things, that she "sustained a compensable injury and/or aggravation of a pre-existing

condition to her lumbar spine as a result of lifting heavy boxes of books and scanning those boxes on August 11, 2005 while performing her employment for the respondent. This claim was initially accepted as compensable and the claimant was treated initially by Dr. Gary Moffitt. The claimant subsequently underwent an MRI of the lumbar spine on September 1, 2005 which revealed a herniated disc at L5-S1 on the right....The claimant was subsequently referred to Dr. Cyril Raben M.D. for evaluation and treatment. The respondents controverted this claim in its entirety on or about January 19, 2006. The claimant was evaluated by Dr. Cyril Raben and he took the claimant off work effective February 8, 2006....Surgery was performed on April 13, 2006 with a hemilaminotomy, and discectomy L5-S1 on the right being performed at the Physician's Surgery Center in Fayetteville....Dr. Raben recommended additional surgery and on August 2, 2006 the claimant was admitted to Washington Regional Medical Center. An anterior lumbar interbody fusion was performed at L4-5 and L5-S1 with instrumentation. On the next day, August 3, 2006, the claimant underwent posterolateral fusion L4 to the sacrum with instrumentation. Dr. Raben has maintained the claimant off work and has

indicated that she will have a lengthy recovery from these surgeries."

The respondents controverted the claim. The respondents contended that the claimant "did not sustain a compensable injury on August 11, 2005 nor did she aggravate a pre-existing condition. The respondents further contend that the claimant is beyond her healing period." The respondents contended that Dr. Raben's treatment was not reasonably necessary "even if the claimant is ultimately found to have sustained a compensable injury or aggravated a pre-existing condition." The respondents contended that "if the claimant is ultimately found or determined to have sustained a compensable injury then in that event they are entitled to a credit for all monies or other compensation the claimant has realized by way of disability or unemployment benefits subsequent to August 11, 2005."

The parties agreed to litigate the following issues:

1. Compensability of injury to claimant's lumbar spine on August 11, 2005.
2. Temporary total disability benefits from February 8, 2006 through a date yet to be determined.
3. Medical from Dr. Raben.
4. Attorney fee.
5. Credit for group disability benefits and unemployment compensation.

The parties deposed Dr. Raben on February 19, 2007. On questioning from the respondents' attorney, Dr. Raben confirmed his February 2006 diagnosis of lumbar radiculopathy. Dr. Raben defined "radiculopathy" as "irritation of a nerve root." The respondents' attorney questioned Dr. Raben:

Q. Do you believe that the hernia that Ms. Hernandez presented to you occurred on August 11, 2005, at Wal-Mart?

A. Was that the date of the initial ...

Q. Yes.

A. ... work comp injury?

Q. Yes.

A. On history that's the only thing I've got, I believe....

Q. Can you state within a reasonable degree of medical certainty that the right-sided disc herniation occurred at Wal-Mart on August 11, 2005?

A. Within a reasonable degree of medical certainty, unless you can come up with other history that would steer me otherwise.

Q. Do you find Ms. Hernandez credible?

A. Yes...

Q. What is the recovery time for Ms. Hernandez? You mentioned three to six months. Does it go longer than that after this fusion she had in August 2006?

A. Yes. A fusion will continue to mature for at least a year, sometimes as long as two, so I hold off on having my patients reach maximum medical intervention until they are at least one year out and then we'll evaluate and see what they are able to do....

The administrative law judge filed an opinion on April 30, 2007. The ALJ found, in pertinent part:

2. Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on August 11, 2005.

3. Claimant is entitled to temporary total disability benefits beginning February 23, 2006 and continuing through a date yet to be determined. The respondent is entitled to a credit for any disability benefits the claimant received during this same period of time.

4. Respondent is liable for payment of medical treatment claimant received from Dr. Raben. This includes testing and the surgical procedures.

5. Respondent has controverted claimant's entitlement to all indemnity benefits subsequent to February 23, 2006.

The respondents appeal to the Full Commission.

## II. ADJUDICATION

### A. Compensability

Ark. Code Ann. §11-9-102(4) (A) defines "compensable injury":

(i) An accidental injury causing internal or external physical harm to the body ...arising out of and in the course of employment and which requires medical services or results in disability or death. An injury is "accidental" only if it is caused by a specific incident and is identifiable by time and place of occurrence[.]

A compensable injury must be established by medical evidence supported by objective findings. Ark. Code Ann. §11-9-102(4) (D). "Objective findings" are those findings which cannot come under the voluntary control of the patient. Ark. Code Ann. §11-9-102(16) (A) (i).

The claimant's burden of proof shall be a preponderance of the evidence. Ark. Code Ann. §11-9-102(4) (E) (i). Preponderance of the evidence means the evidence having greater weight or convincing force. *Smith v. Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W.2d 442 (1947).

The administrative law judge found in the present matter, "Claimant has proven by a preponderance of the evidence that she suffered a compensable injury to her low back while employed by respondent on August 11, 2005." The Full Commission affirms this finding. The claimant had been employed with Wal-Mart since September 2000. The claimant testified that she was working for the respondent-employer on August 11, 2005, and that she began feeling pain in her lower back after lifting boxes. The claimant testified that she informed her supervisor and her manager that her back was hurting. Kenneth Pack testified that he remembered the incident and that the claimant notified him on or about

August 12, 2005 that an injury had occurred. The claimant signed an Employee's Notice Of Injury on August 12, 2005 and reported that she was suffering from lower back pain after lifting boxes at work.

Dr. Berestnez saw the claimant on August 15, 2005 and assessed "lumbar strain." Dr. Moffitt also treated the claimant and diagnosed lumbar strain. Dr. Moffitt observed muscle spasm on September 1, 2005 and September 30, 2005. Muscle spasms are evidence of objective medical findings not within the claimant's voluntary control. *Continental Express, Inc. v. Freeman*, 339 Ark. 142, 4 S.W.3d 124 (1999).

The Full Commission finds that the claimant proved she sustained an accidental injury causing physical harm to the body. The physical harm was in the form of a lumbar strain as diagnosed by Dr. Berestnev and Dr. Moffitt. The injury arose out of and in the course of the claimant's employment with the respondents, and the injury required medical services. The accidental injury was caused by a specific incident and identifiable by time and place of occurrence on August 11, 2005. Dr. Tomlinson noted that the claimant felt acute pain in her low back after lifting a 35-pound box. This medical note was evidence of a specific incident identifiable by time and place of occurrence. The claimant

also established a compensable injury by medical evidence supported by objective findings, namely, the observations of spasm by Dr. Moffitt. We therefore affirm the administrative law judge's finding that the claimant proved she suffered a compensable injury on August 11, 2005.

B. Medical Treatment

The employer shall promptly provide for an injured employee such medical treatment as may be reasonably necessary in connection with the injury received by the employee. Ark. Code Ann. §11-9-508(a). The claimant must prove by a preponderance of the evidence that she is entitled to additional medical treatment. *Wal-Mart Stores, Inc. v. Brown*, 82 Ark. App. 600, 120 S.W.3d 153 (2003). What constitutes reasonably necessary medical treatment is a question of fact for the Commission. *Dalton v. Allen Eng'g Co.*, 66 Ark. App. 201, 989 S.W.2d 543 (1999).

In the present matter, the administrative law judge found that the respondents were liable for payment of medical treatment the claimant received from Dr. Raben, including testing and surgery. The Full Commission reverses this finding, because the claimant did not prove that Dr. Raben's treatment was reasonably necessary in connection with the compensable injury.

The Full Commission has determined that the instant claimant sustained a compensable injury in the form of a lumbar strain. We recognize that an MRI on September 1, 2005 showed a disc herniation at L5-S1. The evidence does not demonstrate, however, that the disc herniation was the causal result of the claimant's lumbar strain occurring on August 11, 2005. Dr. Moffitt noted that the herniation was on the right side and did not correlate with the claimant's symptoms. Dr. Tomlinson, an orthopedic surgeon, noted on September 21, 2005 that there was a protruding L5-S1 disc, but Dr. Tomlinson opined that the claimant had "a high chance of full recovery with therapy alone." Dr. Tomlinson did not opine that the L5-S1 disc protrusion was the result of an accidental injury. The claimant informed Dr. Moffitt on November 1, 2005 that she was doing much better with only minor pain. Dr. Moffitt found no significant tenderness to palpation and no muscle spasm. Dr. Moffitt opined that the claimant needed no further treatment.

Dr. Donnell, the claimant's personal physician, referred the claimant to Dr. Danks, a neurological surgeon. Dr. Danks examined the claimant on February 7, 2006 and assessed back pain with degenerative disc bulging at L5-S1. There is no probative evidence of record demonstrating that

the claimant's August 11, 2005 lumbar strain caused the degenerative bulging at L5-S1. Nor did Dr. Danks opine that the claimant's degenerative bulging was the result of an acute injury. Dr. Danks also did not causally connect his recommendation for epidural injections to the claimant's compensable injury.

The claimant began treating with Dr. Raben on February 14, 2006. Dr. Raben ultimately performed three surgeries to the claimant's lumbar spine. We are mindful of Dr. Raben's opinion expressed to the claimant's attorney on April 25, 2006, to wit: "I believe the acute and proximate cause of her symptomology is related to an on-the-job injury creating a lumbar disc herniation. This subsequently, of course, resulted in her need for surgical intervention." Dr. Raben expressed substantially the same opinion during his deposition testimony.

The Commission has the authority to accept or reject a medical opinion and the authority to determine its probative value. *Poulan Weed Eater v. Marshall*, 79 Ark. App. 129, 84 S.W.3d 878 (2002). It is within the Commission's province to weigh all of the medical evidence and to determine what is most credible. *Minnesota Mining & Mfg. v. Baker*, 337 Ark. 94, 989 S.W.2d 151 (1999). In the present matter, the

Full Commission finds that Dr. Raben's opinion is entitled to minimal weight. The evidence before us does not demonstrate that the claimant's disc herniation at L5-S1 shown on September 1, 2005 was caused by the claimant's lumbar strain occurring on August 11, 2005. None of the claimant's treating physicians, other than Dr. Raben, opined that the claimant had sustained a herniated disc as a result of her lumbar strain. Dr. Berestnev and Dr. Moffitt recommended conservative non-surgical treatment. Dr. Tomlinson, an orthopedic surgeon, recommended therapy alone. Dr. Danks, a neurological surgeon, recommended epidural injections. The record before the Commission does not show that Dr. Raben's surgical treatment was reasonably necessary in connection with the injury received by the employee. The Full Commission therefore reverses the administrative law judge's finding that the respondents are liable for Dr. Raben's treatment. We find that the respondents are not liable for Dr. Raben's treatment, including diagnostic testing and surgery.

C. Temporary Disability

Temporary total disability is that period within the healing period in which the employee suffers a total incapacity to earn wages. *Ark. State Hwy. Dept. v.*

*Breshears*, 272 Ark. 244, 613 S.W.2d 392 (1981). "Healing period" means "that period for healing of an injury resulting from an accident." Ark. Code Ann. §11-9-102(12). Whether or not an employee's healing period has ended is a question of fact for the Commission. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002).

The administrative law judge found in the present matter that the claimant was entitled to temporary total disability benefits beginning February 23, 2006 and continuing through a date to be determined. The Full Commission reverses this finding. The claimant sustained a compensable lumbar strain on August 11, 2005. The respondents provided reasonably necessary medical treatment for the claimant, which treatment included physical therapy. None of the initial treating physicians, including an orthopedic surgeon, opined that the claimant had sustained a herniated disc as a result of her compensable injury. The claimant informed Dr. Moffitt on November 1, 2005 that she was doing much better with only a minor amount of pain in her lower back. Dr. Moffitt found no significant tenderness and no muscle spasm. The claimant's reflexes were normal and she had a normal gait. Dr. Moffitt released the claimant to work at full duties. Dr. Moffitt recommended no

further treatment and opined that the claimant had sustained no permanent anatomical impairment.

The record before the Full Commission shows that the claimant reached the end of the healing period for her compensable lumbar strain no later than November 1, 2005. Temporary total disability cannot be awarded after an employee's healing period has ended. *Elk Roofing Co. v. Pinson*, 22 Ark. App. 191, 737 S.W.2d 661 (1987). There is no probative evidence demonstrating that the claimant re-entered a healing period for her compensable lumbar strain after November 1, 2005.

Based on our *de novo* review of the entire record, the Full Commission finds that the claimant sustained a compensable injury to her low back, in the form of a lumbar strain, on August 11, 2005. The claimant reached the end of the healing period for her compensable lumbar strain no later than November 1, 2005. The claimant did not prove that she was entitled to temporary total disability benefits beginning February 8, 2006 and following. The claimant did not prove that any treatment provided by Dr. Raben was reasonably necessary in connection with the compensable injury. The Full Commission therefore affirms the administrative law judge's opinion as modified. For

prevailing in part on appeal, the claimant's attorney is entitled to a fee of five hundred dollars (\$500), pursuant to Ark. Code Ann. §11-9-715(b)(2) (Repl. 2002).

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. MCKINNEY, Commissioner

Commissioner Hood concurs in part and dissents in part.

**CONCURRING AND DISSENTING OPINION**

I must respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I agree with the majority that the claimant sustained a compensable specific incident lumbar spine injury while lifting boxes for the respondent on August 11, 2005. However, I disagree with the majority's finding that the claimant's injury resolved no later than November 1, 2005 and that the claimant's present need for medical treatment and temporary total disability benefits is not causally related to the August 11, 2005 compensable injury. After a de novo review of the record, I find that the claimant

sustained a compensable specific incident injury to the lumbar spine on August 11, 2005. I find that the claimant's present need for both medical treatment and temporary total disability benefits is causally connected to the August 11, 2005 compensable injury. I find that the treatments proposed by the claimant's treating physician, Dr. Raben, represent reasonably necessary medical treatment and are a liability of the respondent. I find that the preponderance of the evidence shows that the claimant is entitled to temporary total disability benefits from February 8, 2006, until a date yet to be determined. Therefore, I must respectfully dissent from the majority opinion on these issues.

The claimant testified that she was lifting and scanning merchandise in the respondent's facility on August 11, 2005 when she felt a pain in her back. The claimant testified that she reported the injury to her supervisor, Jim Land, and her manager, Ken Pack, and a Form N was completed on August 12, 2005. On August 15, the claimant was sent to Dr. Constantin Berestnev, who diagnosed a lumbar strain and ordered physical therapy. The claimant went to physical therapy three days a week

for two weeks and was placed on light duty at work. As her physical therapy was scheduled to end on August 31, the claimant's physical therapist, Mr. Steve Joseph, recommended one more week of therapy because the "pain is still activity dependent." Nonetheless, the claimant was not prescribed any more physical therapy and she continued to work with light duty restrictions, as she had since August 11.

On the night of August 31, 2005, the claimant was taken to the emergency room in an ambulance for back pain. In the EMT's notes, the August 11 incident was listed as the cause of the injury. It was not until the emergency room visit on September 1 that the claimant underwent an MRI. This MRI revealed a herniated disk at the L5-1 level of the claimant's spine. The claimant was taken off work until September 3. On the same day the initial MRI was taken, Dr. Moffitt examined the claimant. Dr. Moffitt noted that the injury was a lumbar sprain and that the claimant's symptoms were inconsistent with the herniated disk, despite the fact that the ER records indicate the pain radiated down the same side of the claimant's body as the herniated disk. On September 6, Dr. Moffitt again saw the claimant,

resuming the claimant's physical therapy and returning the claimant to light duty work.

The claimant returned to Dr. Moffitt on September 12 and her lifting restrictions were raised to 10 pounds. The claimant returned to Dr. Moffitt on September 19 and he noted the claimant had an episode where she was sitting on her couch and had total numbness of her right arm and leg and intermittent weakness in her right arm and leg. Dr. Moffitt also recommended a second opinion from an orthopedic surgeon.

On September 20, 2005, the claimant went to Dr. Hugh Donnell, her family physician. Dr. Donnell took the claimant off work for two days. The claimant saw Dr. Tomlinson, an orthopedic surgeon, on September 21, 2005. Dr. Tomlinson noted that the claimant had a high chance of full recovery with therapy alone and ordered her to continue light duty at work.

The claimant then went to see Dr. Moffitt again on September 30. At this visit, Dr. Moffitt noted numbness in the right upper leg and pain going down into her right arm and continued the claimant on light duty at work. After visiting Dr. Moffitt and Dr. Donnell for psychological issues related to her back injury, the

claimant returned to Dr. Moffitt on November 1. Dr. Moffitt noted that the claimant was having numbness of the dorsal aspect of the great toe of the right foot, which correlates to the MRI findings. At that time Dr. Moffitt released the claimant to full duty work, apparently ignoring the herniated disk, as he noted the claimant lacked objective medical findings. The claimant testified that she was placed back at the same job she had with the August 11 injury. The claimant then went to chiropractor Dr. Warren Haughey, who noted that her right leg was "numb/heavy" and that her pain started on her left and went down her right side.

The claimant then returned to Dr. Donnell concerning depression on December 5, 2005. The notes indicate the claimant was attempting to transfer to the jewelry department where she would not have to lift heavy items. During her next visit to Dr. Donnell, on December 9, 2005, the medical notes indicate the claimant had pain which radiated down the right side of her leg with a burning feeling. On December 23, the claimant returned to Dr. Donnell, again complaining of the identical pain she felt and relating it back to the

August 11 injury. Dr. Donnell noted that he had never seen the MRI report.

The claimant returned to Dr. Moffitt on January 13, 2006, complaining of lower back pain going down her right leg and foot as well as numbness in these areas. Dr. Moffitt injected the claimant with Depo-Medrol and returned the claimant to full duty. The claimant returned to Dr. Donnell, who noted that the workers' compensation claim is being closed despite continued symptoms. Dr. Donnell then referred the claimant to Dr. R. Kelly Danks, a neurosurgeon, who recommended an epidural steroid injection. The claimant returned to Dr. Donnell on February 8, 2006 and she was taken off work until February 26, 2006.

The claimant went to the emergency room on February 13, 2006 complaining of lower back pain radiating into the left hip and going down the right leg with some sensory motor loss and numbness in the foot. The claimant was injected for pain and given a prescription for Vicodin. The claimant was referred to Dr. Cyril Raben and scheduled a visit the next day. During this visit, the claimant maintained that the pain related back to the August 11, 2005 injury. At the

February 14, 2006 visit to Dr. Raben, the claimant described her pain on the right side and lower extremities. Dr. Raben ordered a new MRI scan which the claimant underwent on February 17, 2006. The February 17 MRI revealed a disk herniation at level L5-S1, the same level as the MRI obtained on September 1, 2005.

The claimant then saw Dr. Miles Johnson, who performed an EMG on February 21, 2006. On February 23, 2006 the claimant went to see Dr. Raben, who ordered a disc space and epidural steroid injection and took the claimant off work on this date. The claimant underwent a disk space injection at L5-S1 on March 13, 2006. The claimant underwent a neural foraminal block on March 27, 2006. Because the claimant did not receive much relief from the pain, Dr. Raben recommended surgery. On April 13, 2006, the claimant underwent a hemilaminotomy at L5-S1 on the right. The April 25, 2006 medical notes from Dr. Raben related the injury to the August 11, 2005 incident at the respondent's facility.

The claimant returned to Dr. Raben on May 15, 2006 and complained of recurring pain related to the surgery on the injured area of her spine. Another MRI was performed on May 24, 2006, which revealed post-

operative scarring. Subsequently, on August 2 and 3, 2006 underwent anterior and posterior lumbar fusion. In the August 21, 2006 medical notes, Dr. Raben orders the claimant off work for at least the next year.

For the claimant to establish a compensable injury as a result of a specific incident which is identifiable by time and place of occurrence, the following requirements of Ark. Code Ann. § 11-9-102(4) (A) (i) (Repl. 2002), must be established: (1) proof by a preponderance of the evidence of an injury arising out of and in the course of employment; (2) proof by a preponderance of the evidence that the injury caused internal or external physical harm to the body which required medical services or resulted in disability or death; (3) medical evidence supported by objective findings, as defined in Ark. Code Ann. Sec. § 11-9-102(16), establishing the injury; and (4) proof by a preponderance of the evidence that the injury was caused by a specific incident and is identifiable by time and place of occurrence. If the claimant fails to establish by a preponderance of the evidence any of the requirements for establishing the compensability of a claim, compensation must be denied. Mikel v. Engineered

Specialty Plastics, 56 Ark. App. 126, 938 S.W.2d 876 (1997).

Based on the claimant's credible testimony and medical records, I find that the claimant has met the burden of proving by a preponderance of the evidence that she sustained a herniated disk injury at work on August 11, 2005. First, the claimant's injury occurred as a result of the act of lifting a box of books at the respondent's facility, which is a specific incident injury arising out of and in the course of employment. Second, the claimant required several visits to medical doctors and physical therapy to help heal the injury. On September 1, 2005, Dr. Moffit diagnosed a herniated nucleus pulposus at the spine level L5-S1.

The majority has apparently, based on Dr. Moffitt's reports, erroneously concluded that the claimant's symptoms are inconsistent with the MRI. In all the reports of the injury the pain was described as lower back pain, either without specific regard for which side of the back was affected or pain specific to the right side. The physicians' conclusions have noted consistent pain on the right side of the claimant's leg

and foot, which would, in fact, correlate to the MRI findings for the claimant.

While Dr. Tomlinson, Dr. Danks, Dr. Raben, and, eventually, Dr. Moffitt all agreed that the claimant had a herniated disk, the majority has apparently ignored not only the claimant's timely report of a specific incident at work, but also the consistent course of treatment engaged in at the direction of her doctors, and the fact that the claimant was on light duty related to the specific incident during the time period between the date of injury and the first MRI. Despite this, the majority has somehow concluded that the claimant's herniated disk injury was not caused by the August 11 specific incident, yet the evidence of record presents no alternate, reasonable explanation, as to how the claimant's injury, could have otherwise occurred. Conjecture and speculation, even if plausible, cannot take the place of proof. Ark. Dept. of Correction v. Glover, 35 Ark. App. 32, 812 S.W.2d 692 (1991). Dena Construction Co. v. Herndon, 264 Ark. 791, 575 S.W.2d 155 (1979). Arkansas Methodist Hospital v. Adams, 43 Ark. App. 1, 858 S.W.2d 125 (1993). Here, the claimant credibly testified as to the occurrence. She

reported it and filled out the Form N on August 12. The respondent immediately put her on light duty and sent her to a doctor three days later. The claimant was kept on light duty and received physical therapy treatment. Then, 17 days later, the MRI showed the herniated disk. There is nothing in the record which would imply the injury was anything but related-back to the August 11<sup>th</sup> injury. If the respondent claims some sort of intervening cause of the disk herniation, then the respondent should point to a specific incident or circumstance other than the claimant's job lifting merchandise as a cause. Given the circumstances here, with the proximity of time between the initial report of injury and in the absence of sufficient evidence to point to another cause of the herniated disk, I find that the injury occurred on August 11<sup>th</sup> and that the claimant has satisfied all of the elements set forth in 11-9-102(4)(A)(i).

The majority apparently finds that the claimant's credibility was suspect because the claimant was unable to pinpoint the location of her pain or, because she pointed out pain in multiple locations at different times. To the contrary, I find the claimant's

testimony to be very credible. The claimant, who speaks limited English and has an 8<sup>th</sup> grade education, consistently maintained that she had lower back pain. The initial medical report stated that "lower back pain that radiates around to the left side." The claimant and all witnesses questioned about the issue testified that the claimant had no known back problems prior to August 11<sup>th</sup>, 2005. The claimant is an unloader at Wal-Mart, not a doctor; she should not be responsible for diagnosing herself. The claimant was diagnosed with a herniated nucleus pulposus at L5-S1 on September 1<sup>st</sup>, 2005 after her first MRI, which the respondent doctors had apparently been unwilling to provide. Indeed, it took a trip to the emergency room for the claimant to receive this MRI, a basic diagnostic tool.

The majority has also erroneously determined that the medical treatments provided and performed by Dr. Raben are not reasonably necessary medical treatment. The Workers' Compensation Act requires employers to provide such medical services as may be reasonably necessary in connection with an employee's injury. Ark. Code. Ann. §11-9-508(a) (Repl. 2002); American Greeting Corp. v. Garey, 61 Ark. App. 18, 963

S.W.2d 613 (1998). Injured employees must prove that medical services are reasonably necessary by a preponderance of the evidence; however, those services may include that necessary to accurately diagnose the nature and extent of the compensable injury; to maintain the level of healing achieved; or to prevent further deterioration of the damage produced by the compensable injury. Ark. Code Ann. §11-9-705(a)(3) (Repl. 2002); Jordan v. Tyson Foods, Inc., 51 Ark. App. 100, 911 S.W.2d 593 (1995); See Artex Hydroponics, Inc. v. Pippin, 8 Ark. App. 200, 649 S.W.2d 845 (1983). Here, the majority erroneously states that Dr. Raben's opinion is entitled to minimal weight and that his surgical procedure which attempted to heal the injury that occurred at work was not reasonably necessary. I disagree. Dr. Raben is a neurosurgeon and the claimant had consistently complained of lower back pain even after being prescribed medications, undergoing physical therapy, and receiving steroid injections. Therefore, I find that Dr. Raben's treatment was reasonably necessary in connection with the claimant's admittedly compensable back injury.

Furthermore, the majority's reliance on Dr. Tomlinson's opinion that there was a "high chance of full recovery with therapy alone" is unsound. It seems that while Dr. Tomlinson was hoping for the best, his foretelling as to the probability of full recovery was incorrect, which is why the claimant had to continue medical treatment with her neurosurgeon, Dr. Raben.

Regarding the temporary total disability benefits, the Administrative Law Judge found that the testimony of Dr. Raben in which he states that the fusion mass in the claimant's spine must be given one year to mature and full heal was convincing to conclude that the healing period related to the work-related injury was not yet reached. I find this conclusion valid and would uphold the decision of the Administrative Law Judge that the treating physician must be allowed to determine that the claimant has healing has been completed. As the claimant remains in her healing period and is totally incapacitated, I find she is entitled to temporary total disability benefits until a date yet to be determined. See *Breshears v. Ark. State Highway Dept.*, 272 Ark. 244, 613 S.W.2d 392 (1981).

In conclusion, I must respectfully concur, in part, and dissent, in part, from the majority opinion. Specifically, I agree with the majority that the claimant sustained a compensable specific incident lumbar spine injury while lifting boxes for the respondent on August 11, 2005. However, I disagree with the majority's finding that the claimant's injury resolved no later than November 1, 2005 and that the claimant's present need for medical treatment and temporary total disability benefits is not causally related to the August 11, 2005 compensable injury. I find that the preponderance of the evidence shows that the claimant is entitled to temporary total disability benefits from February 8, 2006, until a date yet to be determined.

For the aforementioned reasons, I must respectfully dissent, in part, and concur, in part.

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PHILIP A. HOOD, Commissioner